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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	IB Docket No. 95-59
	)	

JOINT COMMENTS OF
THE ROUSE COMPANY AND
THE COLUMBIA ASSOCIATION, INC.

I. INTRODUCTION AND SUMMARY

The Rouse Company and The Columbia Association, Inc. (the "Commenters") by their attorneys, hereby file these comments in response to the Commission's Further Notice of Proposed Rulemaking[1] concerning whether governmental restrictions should be applied to restrictive covenants where the property is commonly-owned, rented, or commercially leased.[2] The Rouse Company is a national development company that owns and manages commercial real estate projects consisting of shopping centers, mixed use projects, office buildings, business/industrial parks and large-scale planned land development throughout the country.[3] The Columbia Association is a Maryland non-profit civic organization, authorized to enforce

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[1] Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, FCC 96-328 (rel. Aug. 6, 1996) ("Further Notice").

[2] *Id.* at ¶¶ 59-65.

[3] Among The Rouse Company's more sizable projects are the planned community of Columbia, Maryland and through its contract purchase of the Howard Hughes Properties, L.P., the developer of Summerlin, a 22,500 acre, master-planned community outside Las Vegas, Nevada.

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certain restrictive covenants in connection with residential property in the planned community of Columbia, Maryland.

The Commenters have serious concerns about the Commission's proposal to extend Section 207 to apply to nongovernmental restrictions on leased property and property not within the exclusive control of the viewer who has an ownership interest. The application of Section 207 to leased and commonly-held property would result in an unconstitutional taking of property. In addition, implementation and enforcement of Section 207 as applied to leased and commonly-owned property would be highly impractical.

II. APPLICATION OF SECTION 207 TO LEASED AND COMMONLY-OWNED PROPERTY WOULD EFFECT A TAKING FOR WHICH COMPENSATION IS REQUIRED

Application of Section 207 in a manner suggested by the Commission would essentially grant third parties the right to exclusive use of a portion, or several portions, of the owners' property and would thereby implicate the Just Compensation Clause of the Fifth Amendment, under which a "permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[4] The Commission's proposal to adopt a rule requiring that landlords permit antenna installation on their property is analogous to the statute at issue in Loretto, which required landlords to permit installation of cable television facilities upon their property.[5] Like the statute in Loretto, the Commission's rule requiring owners of commonly-owned and leased property to allow the attachment of antennas, dishes, and other

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[4] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("Loretto"); *see also* Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) ("Bell Atlantic"); Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600 (11th Cir. 1992) ("Cable Holdings").

[5] Further Notice at ¶ 64 (the Commission sought comment on whether its proposal to apply Section 207 to leased or commonly-owned property would result in a taking under Loretto).

over-the-air reception devices on their property and surrounding areas by third parties would result in a taking of property.

The fact that over-the-air reception devices are relatively small in size is irrelevant. The size of the invasion is immaterial, "even if [the devices] occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land."[6] The mandated access of over-the-air reception devices contemplated by the Commission is analogous to the mandated attachment of plates, boxes, and other cable equipment in Loretto. The fact that the property was commercial, leased property was immaterial to whether there was a taking. The key factor is that the taking is permanent in nature.

An "owner's right to exclude another's physical presence must be tenaciously guarded."[7] As the Court noted in Loretto, "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property."[8] This includes the right to obtain a profit, to dwell on the property, and the right to exclude others. As the Court stated, the "power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."[9] Indeed, the "most fundamental private property right is the owner's ability to exclude others."[10] But for Section 207, property owners would continue to make decisions concerning the use and occupation of their property in accordance with their preapproved arrangements. To the extent that the Commission authorizes permanent physical

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[6]Loretto, 458 U.S. at 430.

[7]Cable Holdings, 953 F.2d at 605.

[8]458 U.S. at 436.

[9]*Id.* at 435.

[10]Cable Holdings, 953 F.2d at 604.

occupations, it "effectively destroys" the owners' "rights to possess, use, and dispose of the property."[11]

Moreover, the Commenters find it highly improbable that Congress intended the Commission to expose the federal government to a new class of takings claims. The Commission *presumes* that it possesses the requisite authority to compensate property owners across the country,[12] but there is nothing in Section 207 or the legislative history that suggests that the Commission has the authority to take private property and award just compensation. Indeed, courts generally avoid statutory constructions that create serious constitutional problems, such as conditioning a property owner's right to exclude others from his property.[13] In light of the serious constitutional ramifications of the Commission's proposal, it should not extend application of Section 207 to leased and commonly-owned property.

"When the government appropriates an owner's right to exclude another's physical presence without paying the owner just compensation, the government violates the Takings Clause."[14] While the Tucker Act is generally presumed available unless explicitly foreclosed by Congress, agencies should avoid creating a "broad class of takings claims[] compensable in the Court of Claims."[15] Specifically, the court noted that "deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use

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[11] Loretto, 458 U.S. at 420. As the Commission acknowledged, a *per se* taking occurs when the government or a third party authorized by the government physically appropriates private property. Further Notice at ¶ 43.

[12] Further Notice at n. 125.

[13] *See, e.g.*, Bell Atlantic, 24 F.3d at 1445 ("statutes will be construed to defeat administrative orders that raise substantial constitutional questions") (citations omitted); Cable Holdings, 953 F.2d at 604 ("courts will avoid any interpretation of a federal statute which raises serious constitutional problems") (citations omitted).

[14] Cable Holdings, 953 F.2d at 604-05.

[15] Bell Atlantic, 24 F.3d at 1445.

statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen."[16] By implementing a rule that essentially alters the property rights of landowners all across the country, the Commission's actions would give rise to untold numbers of claims against the federal government.

Based on language contained only in the House Report,[17] the Commission has transformed efforts to promote competition in video services into a revamping of property laws. Neither Section 207 as enacted, nor the Conference Report, references restrictive covenants or Commission authority to effect takings. There also is no express or implied authority for the Commission to engage in a detailed analysis and segregation of property rights in order to enable a few individuals to receive satellite programming services.

Takings authority will only be implied where "such an implication may be made only as a matter of necessity, where 'the grant [of authority] itself would be defeated unless [takings] power were implied."[18] The Commission can prohibit restrictions that impair viewers' ability to receive video programming without adopting rules that make technology available to every individual in every circumstance. In stating that restrictive covenants are not immune from federal authority, the Commission relies on cases that nullified restrictive covenants that affected

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[16] *Id.*

[17] "The Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception..." H.R.Rep. No. 204, 104th Cong., 1st Sess. at 24 (1995).

[18] Bell Atlantic, 24 F.3d at 1446 (citations omitted).

basic civil rights, *i.e.*, racial and age discrimination.[19] The desire to receive video programming services cannot be equated with fundamental constitutional rights.[20]

The Commission is moving far afield from the goal of making video programming services available to consumers. Indeed, the Communications Act only requires the Commission to make communications services available to consumers *so far as possible.*[21]

II. THE PRACTICAL PROBLEMS OF AN APPROACH THAT WOULD PERMIT PLACEMENT OF OVER-THE-AIR RECEPTION DEVICES ON LEASED AND COMMONLY-OWNED PROPERTY MILITATE AGAINST SUCH APPROACH

A rule allowing placement of over-the-air reception devices on rental or commonly-owned property would result in a reallocation of property rights between owners and tenants. Implementation and enforcement of such a rule also would be cumbersome and problematic where a community association or landlord is legally responsible for maintenance and repair of the property.[22] It is one thing to permit property owners to place antennae on property over which they have exclusive control and an ownership interest. It would be highly impractical, however, for the Commission to authorize all tenants in a building, whether they be co-owners or lessees, to put over-the-air reception devices on the building and surrounding areas.

1. Preemption would transform the nature of commonly-owned property.

Under the Commission's proposal, an issue arises as to whether the "common area" can be used as originally intended if individuals are permitted to put satellite reception devices all

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[19] Further Notice at n. 130 and ¶ 44.

[20] *Cf.* Cable Investments, Inc. v. Woolley, 867 F.2d 151, 155 (3rd Cir. 1989) (the court rejected the argument that "Congress authorized franchised cable companies to force their way onto private property, over the protests of the property owner, in order to offer cable television service to the tenants of the property owner.").

[21] Communications Act of 1934, *as amended*, § 1, 47 U.S.C. § 151.

[22] Further Notice at ¶ 63 ("we invite commenters to address technical and/or practical problems or any other considerations they believe the Commission should take into account").

over the property. Common areas are intentionally established for the enjoyment of all tenants or co-owners of the property.

The Commission's rule also would have the perverse effect of transforming property intended for the use of all residents and lessees into property under the exclusive use of one resident or lessee. If a tenant or co-owner in a multi-unit dwelling placed an antenna on property intended for the enjoyment of all, the tenant would effectively transform that area into property for his own use to the exclusion of others. Even if one tenant attaches a satellite dish to a common area, thereby transforming the common area into his exclusive territory, the quality of the common area surrounding the dish has been essentially altered. The proximity of satellite dishes to common areas used for picnics, lounging, and games, for example, means that these areas are no longer unfettered and cannot be used for their intended purposes. It would be rather difficult to use the rooftop or lawn areas for recreational purposes, for example, if there are satellite dishes scattered about; even a single dish restricts all users' recreation. It is highly unlikely that Congress intended to reallocate basic property rights when it sought simply to encourage competition in direct-to-home satellite services.

Individual residents lack the legal right to unilaterally alter commonly-owned property. Use of common areas must be coordinated with the other owners of the property. The rights of one tenant or owner should not supersede the rights of the actual owner or other owners. For example, if a viewer attaches a satellite onto leased or common property, and then moves, the owner(s) would be stuck with a satellite dish that was not originally desired. As a general matter, it is reasonable to assume that an individual owner should have more freedom of the use of property that is within his exclusive ownership and control. It is also reasonable to assume that property an individual shares with others cannot be used as if it were the individual's own.

2. Preemption would interfere with maintenance obligations.

Building owners and managers are required to maintain their property in good repair. Placement of over-the-air reception devices present serious maintenance issues, which ultimately become safety and liability issues.

Drilling holes in roofs, for example, can lead to damage to neighboring users' premises. In the case of shopping centers or malls, maintenance of roofs is a major maintenance concern due to leakage and other problems. Consequences of roof damage are serious given that leaks and structure problems are not readily apparent and only worsen over time. Because the resulting damage is ultimately the landowner's responsibility, shopping center owners carefully control and monitor antenna installations. Owners of multi-unit dwellings have the same concerns. Roof damage affects residential units below. Not only are there structural problems, but residents can suffer damage to their units as well as destruction of personal belongings.

3. Preemption would implicate safety issues for landowners.

If landowners cannot maintain their property as they are legally required, safety hazards and building violations will result. Property owners cannot ensure compliance with safety and fire code requirements if they cannot maintain and control the use of the property. Authorizing third parties to enter the premises and place foreign objects on private property significantly reduces the ability of landlords to retain such control. Safety problems are further exacerbated by problems with the devices, such as injuries and property damage if antennas are blown away during severe weather, improperly installed, or installed on weak supporting structures.

Further, if satellite dishes are in common areas where residents and their children or pets congregate and engage in recreational activities, and a satellite dish is damaged or stolen, a question of liability arises. Similarly, if a child is injured while playing near a satellite dish or falls over a dish placed on common area property, a question arises as to who should be responsible.

4. The Commission's proposal would result in groundless distinctions in property.

The Commission should not draw arbitrary distinctions between property owners, especially when the effect is to essentially deprive one group of basic property rights. The owners of commercial, leased, and shared property should retain the same right of control over their property as the individual homeowner. All property owners have the right to possess, use, and dispose of their property as they choose, whether the property is commercial, leased or shared. As discussed in Section II., property owners expect to be "relatively undisturbed"[23] in possession of their property, particularly the right to exclude others from their property. There is no justification for the Commission's discrimination toward certain property owners.

5. Preemption would result in space and technical limitations.

It would be impractical to permit all residents and lessees to place over-the-air reception devices on buildings and surrounding areas. Eventually there will be problems of interference among satellite dishes, as well as environmental concerns, such as RF radiation hazards. It is inconceivable how landowners can maintain property in accordance with federal, state, and local regulations while addressing unanticipated consequences of the placement of satellite dishes on property.

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[23] 458 U.S. at 436.

IV. CONCLUSION

For the foregoing reasons, the Commenters urge the Commission not to apply Section 207 to leased and commonly-owned property.

Respectfully submitted,

THE ROUSE COMPANY and
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